

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 PAUL GREGORY HOUSE, :

4 Petitioner, :

5 v. : No. 04-8990

6 RICKY BELL, WARDEN. :

7 - - - - -X

8 Washington, D.C.

9 Wednesday, January 11, 2006

10 The above-entitled matter came on for oral

11 argument before the Supreme Court of the United States

12 at 11:08 a.m.

13 APPEARANCES:

14 STEPHEN M. KISSINGER, ESQ., Assistant Federal Community

15 Defender, Knoxville, Tennessee; on behalf of the

16 Petitioner.

17 JENNIFER SMITH, ESQ., Associate Deputy Attorney

18 General, Nashville, Tennessee; on behalf of the

19 Respondent.

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P R O C E E D I N G S

(11:08 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument
next in House v. Bell.

Mr. Kissinger.

ORAL ARGUMENT OF STEPHEN M. KISSINGER
ON BEHALF OF THE PETITIONER

MR. KISSINGER: Mr. Chief Justice, may it
please the Court:

The jurors which --

JUSTICE O'CONNOR: Why don't you raise the
level of the podium a little so we can hear you?

MR. KISSINGER: Is that better, Your Honor?

JUSTICE O'CONNOR: Not much.

MR. KISSINGER: One more sound check. Does
that --

CHIEF JUSTICE ROBERTS: Thank you.

MR. KISSINGER: Thank you.

The jurors who convicted Mr. House of first
degree murder heard that semen stains on the victim's
clothing matched Mr. House. They didn't hear the DNA
evidence which showed that not to be the case.

The jurors heard --

JUSTICE O'CONNOR: Was that because there was
no such analysis at the time?

1 MR. KISSINGER: That's correct, Justice
2 O'Connor.

3 JUSTICE O'CONNOR: How many years ago was
4 this trial?

5 MR. KISSINGER: The trial, Your Honor, was
6 approximately 20 years ago.

7 The jurors who convicted Mr. House heard that
8 bloodstains on Mr. House's blue jeans matched the blood
9 belonging to the victim. They didn't hear the
10 assistant chief medical examiner for the State of
11 Tennessee testify that the source of those bloodstains
12 was a sample taken during Ms. Muncey's autopsy, nor did
13 they hear --

14 JUSTICE SCALIA: The district court heard
15 that, though, didn't it?

16 MR. KISSINGER: That's correct, Justice
17 Scalia.

18 JUSTICE SCALIA: And didn't believe it.
19 Right? And did not believe it. Found as a matter of
20 fact that the blood was -- was not a result of the
21 spill.

22 MR. KISSINGER: Justice Scalia, the court
23 made a conclusion that the blood which had spilt from
24 the tube had spilt after -- after the blood had been
25 tested. It did not, however, make a factual finding.

1 It made a conclusion of law regarding that, Your Honor.

2 JUSTICE SCALIA: That -- is that a conclusion
3 of law?

4 MR. KISSINGER: It is, Your Honor. If the
5 Court were to look at the district court order, the
6 district court order was divided into two distinct
7 parts. The first part --

8 JUSTICE SCALIA: I don't care what part it
9 put it in. The district court did not believe that the
10 blood on the trousers was a consequence of the spill
11 and that -- and that, therefore, blood was identified
12 on the inside of his trousers that was the blood of the
13 victim. That's what the district court believed,
14 having heard the testimony.

15 MR. KISSINGER: Your Honor, what the district
16 -- what the district court concluded as a matter of law
17 was that it -- that notwithstanding Dr. Blake's
18 testimony regarding the source of the blood found on
19 Mr. House's jeans, that that did not eliminate the --
20 eliminate the testimony of Agent Scott who said that he
21 saw blood on the jeans when he first -- excuse me. Let
22 me rephrase that because it's actually a critical
23 matter. He saw what he thought appeared to be
24 bloodstains on the jeans when he first picked them up.

25 What the district court did in that instance

1 was exactly the error that Mr. House has brought to the
2 attention of this Court, which is in the face of
3 evidence of innocence, the district court, simply
4 because it found some contrary evidence in the record,
5 found that Mr. House had failed to make his showing.

6 JUSTICE SCALIA: On that point -- on that one
7 point, do you contend that the district court was
8 clearly erroneous?

9 MR. KISSINGER: Your Honor --

10 JUSTICE SCALIA: On that one point of the
11 blood, of whether, indeed, his blood was on -- or the
12 victim's blood was on the inside of his trousers? On
13 that one point, do you claim that the district court
14 was clearly erroneous?

15 MR. KISSINGER: Justice Scalia, we actually
16 make two claims regarding that. First, that that was a
17 conclusion of law entitled to -- entitled to de novo
18 review. Second, that --

19 JUSTICE SCALIA: What's your -- what's your
20 second point? Because I --

21 MR. KISSINGER: Second, Justice Scalia, if
22 indeed it was a finding of fact, yes, that finding of
23 fact was clearly erroneous.

24 JUSTICE SCALIA: On the basis solely of the
25 testimony of -- of this expert.

1 MR. KISSINGER: Your Honor, on the basis of
2 the entirety of the record, which is what this Court
3 instructed the district court to examine when it
4 conducts the Schlup inquiry.

5 JUSTICE SCALIA: Including the contrary
6 testimony that said if it had been the result of a
7 spill, it would not have been splattered all over, as
8 it was here. Some of it wouldn't have been on the
9 inside of the trousers. Some of it wouldn't have been
10 mixed with mud. Despite all of that, you -- you can
11 say that the district court's finding, which I consider
12 a finding of fact, was clearly erroneous.

13 MR. KISSINGER: Your Honor, including not
14 only that testimony, but the testimony of the same
15 expert who made the statements which the Court just
16 cited, who said that she was unable -- that she was
17 excluding merely the direct spillage, the pouring of
18 blood onto the jeans, and conceded in her testimony
19 that the transfer stains which she observed, the type
20 of stains which she observed could, in fact, have been
21 -- that she had no opinion as to the cause of those,
22 only that it was the result of one object wiping
23 against another object.

24 Also, in light of the testimony regarding --

25 JUSTICE SCALIA: Excuse me. I -- I agree

1 that all of this stuff would -- would have made a
2 better case for the defendant here. But once the case
3 has been tried and both sides have put on all the
4 evidence they have, we have a -- a much different test,
5 and -- and that is whether any reasonable juror could
6 have found him guilty. That's a very heavy burden:
7 whether any reasonable jury could have found guilt. I
8 agree it would have been a much closer case, but -- but
9 the burden you -- you have before us here is to
10 establish that no reasonable jury could possibly have
11 found him guilty.

12 MR. KISSINGER: Justice Scalia --

13 JUSTICE SCALIA: And on -- just on the blood
14 thing alone, I -- I find that a hard burden to bear.

15 MR. KISSINGER: Justice Scalia, there --
16 there are two things which come into the -- into the
17 Court's analysis.

18 First is the Court is correct. The burden is
19 quite high, and it's -- it's high for a reason. It's
20 justifiably high. We don't shrink from that burden,
21 Your Honor.

22 What we say is that along with that burden,
23 the Court also requires that the entirety of the
24 evidence be reviewed. If the entirety of the evidence
25 is reviewed and the effect of the entirety of the

1 evidence on a properly instructed, reasonable juror --
2 that's the nature of the -- the determination -- what
3 effect will that have? When we look at the facts in
4 this case, when we look at the blood evidence in this
5 case, yes, we don't deny that there is evidence which
6 could support conviction. However, that is not the
7 test in Schlup. Schlup specifically rejected that
8 inquiry.

9 JUSTICE BREYER: What did it rest on? What
10 -- what is the district court's conclusion? The court
11 concludes that the spillage occurred after the FBI
12 crime lab received and tested the evidence. What does
13 that rest on?

14 MR. KISSINGER: Your Honor, quite frankly, we
15 can't determine that -- that statement rests on
16 anything. The undisputed evidence in the record
17 consists of a photograph of the blood samples at the
18 time they were received by the defense expert. The box
19 was opened. A photograph was taken. The photograph
20 shows clearly that one entire tube of blood is missing
21 and the second tube of blood has leaked within the
22 packaging.

23 But the record also contains the testimony of
24 the TBI agent who transported the blood from the FBI to
25 the defense expert who said he observed no blood that

1 leaked other than the -- other than what was inside the
2 container.

3 It also contains the testimony of the FBI
4 agent who tested the blood at the FBI who said two
5 things. One, I used no -- no more than one quarter of
6 a tube of blood and that no blood spilt while the tube
7 was in the possession of the FBI.

8 JUSTICE SCALIA: It also contained the
9 testimony of an expert who said that if the tube
10 spilled in that way, it would not have created the kind
11 of spatterings that -- that were incriminating in this
12 case. Even if there was some spill, it would not have
13 produced the kind of spattering. So, you know, I call
14 that a draw.

15 MR. KISSINGER: Your Honor, two -- two things
16 to -- two things to point out there. First is that
17 that eliminates only one possible hypothesis and that
18 is the hypothesis that blood was directly spilt onto --
19 onto the -- onto the jeans. I think the example that
20 the expert gave was these are not stains, for example,
21 the pouring of a -- like coffee -- pouring coffee onto
22 the lap of your jeans or something like that. These
23 are simply transfers: one bloody object wiped against
24 another.

25 So while she gave a hypothesis of guilt --

1 and again, Your Honor, it comes to the could and would
2 distinction. If it -- that could be considered
3 evidence of guilt, what would a -- but, however, that's
4 not the inquiry. The inquiry is what would a
5 reasonable juror who heard that on one side, that it
6 didn't spill directly, but on the other side, heard the
7 evidence that we began -- that I began to discuss with
8 Justice Breyer, which is the evidence of the TBI agent,
9 the photographic evidence, the evidence of the FBI
10 agent, the evidence that the styrofoam box was opened
11 during transit to the FBI and that objects were removed
12 from it during transit.

13 JUSTICE KENNEDY: I have two questions on the
14 blood, and there's a lot you want to cover here, so I
15 won't take too much of your time.

16 One, is it significant for your case that
17 this was a very small sample?

18 Two, was the evidence about the enzymatic
19 degradation -- was that available? Was the science
20 about that fully available to the defense at the time
21 of trial?

22 I had those two questions.

23 MR. KISSINGER: Justice Kennedy, in terms of
24 the -- the size of -- of the bloodstains, it was
25 significant to the extent that it bears upon the

1 probative value of the testimony of Charles Scott when
2 he says -- when he said he saw what he thought might be
3 stains. As a simple matter of fact, this -- the jeans
4 were stained with a number of substances, not just
5 blood, and a number of witnesses, including the trial
6 prosecutor himself, described the bloodstains as
7 actually so small that they were difficult to detect by
8 the human eye.

9 The second part of your question, Justice
10 Kennedy, yes. That evidence was available. And our
11 position is that it -- that goes actually to the
12 substance of our constitutional ineffective assistance
13 of counsel claim. Trial counsel had in his possession
14 -- or his expert certainly had in his possession the
15 photograph that showed an entire tube of blood missing.

16 Therefore, he had evidence that there was something
17 wrong with the blood. Trial counsel was actually
18 concerned about this blood. He filed a pretrial motion
19 to suppress this blood evidence. Here's trial counsel
20 with evidence that blood is missing. He knows it's a
21 critical issue in the case and he failed to go out and
22 hire someone like the assistant chief medical examiner
23 for the State of Tennessee who came into Federal court
24 and testified as to the -- that the source of this
25 blood was, in fact, that empty tube.

1 JUSTICE SCALIA: That -- that would be an
2 important point if, in fact, it conclusively
3 established that the blood was not the blood of the
4 victim, but I don't think it does conclusively
5 establish that, and if it doesn't, the -- the less than
6 perfect performance of counsel is -- is no basis for
7 setting aside the conviction.

8 MR. KISSINGER: Your Honor, two matters on
9 that. Again, the proof of innocence does not have to
10 be absolute. This Court stated in Schlup that the fact
11 that there is still some evidence of guilt or that
12 there still exists even substantial evidence of guilt
13 does not prevent a defendant from passing through the
14 Schlup gateway.

15 The second matter and one which I think is
16 important is that as a matter of Tennessee law, a
17 circumstantial evidence case requires not only that the
18 prosecution prove its case beyond a reasonable doubt,
19 but that it eliminate all reasonable hypotheses of
20 innocence. So even if a jury could conclude that the
21 blood came during -- that the blood got on the jeans
22 during the course of the crime, it would also have to
23 be able -- it would also have to be probable that the
24 same jury would also conclude that it was an
25 impossibility for Mr. Blake -- Dr. Blake's testimony to

1 be correct. So, in fact, it's Dr. Blake's testimony
2 which has to be impossible to -- to accept in order for
3 a jury to find -- a reasonable juror to find --

4 JUSTICE GINSBURG: Justice Scalia said blood
5 of the victim. You don't contest that this was the
6 blood of the victim. The question is at what point did
7 it get transferred to the jeans.

8 MR. KISSINGER: That's correct, Justice
9 Ginsburg.

10 JUSTICE GINSBURG: There's no question about
11 it being someone else's blood.

12 MR. KISSINGER: That's correct, Justice
13 Ginsburg. The question has been, from the beginning of
14 this case, when the blood came to get on Mr. House's
15 jeans.

16 JUSTICE SCALIA: Right. And -- and the point
17 of controversy is whether a spill of -- of the -- of
18 the blood in -- in the course of transport could have
19 produced this -- this kind of -- of spattering,
20 including a spattering on the inside of -- of the
21 trousers near the button. It -- it seems to me
22 unlikely, and -- and I am unable to say that no
23 reasonable jury -- juror could not think it unlikely.

24 MR. KISSINGER: Justice Scalia, I -- I would
25 disagree with -- with the Court's analysis there. I --

1 I think what -- what the issue here is more whether,
2 given the testimony of Dr. Blake, given the
3 corroborating evidence that supports Dr. Blake's
4 testimony, would a reasonable juror have doubts or
5 would any reasonable juror have a -- retain a
6 reasonable -- excuse me --

7 JUSTICE SCALIA: It's much more than that.

8 MR. KISSINGER: Let me rephrase that, Justice
9 Scalia. The question is, given the Tennessee jury
10 instruction --

11 JUSTICE BREYER: Any reasonable juror would
12 have had to have a reasonable doubt.

13 MR. KISSINGER: Yes, thank you, Justice
14 Breyer.

15 JUSTICE BREYER: All right. And you're
16 saying yes, any reasonable juror would have had to have
17 a reasonable doubt irrespective of what the trial judge
18 found.

19 MR. KISSINGER: That's correct, Justice
20 Breyer.

21 CHIEF JUSTICE ROBERTS: So the -- so the --
22 we would have to be finding in this case, if we ruled
23 in your favor, that we think the trial judge is
24 unreasonable.

25 MR. KISSINGER: Your Honor, that's actually

1 not correct either. Schlup specifically says that the
2 function of the district judge in a Schlup hearing is
3 not to make an independent judgment on the evidence in
4 front of him, but to make a probabilistic determination
5 of the effect of the evidence on a reasonable juror.

6 JUSTICE SCALIA: Oh, but surely he's supposed
7 to make factual determinations. We -- I -- I don't
8 want to make factual determinations on all these
9 questions. That's -- that's not our system of law.
10 Those factual determinations are made by the trial
11 judge. And here, I agree with you that we don't have
12 to accept his judgment as to what a reasonable juror
13 would have done, but I do think that we have to accept
14 his factual findings as accurate unless they're clearly
15 erroneous. And here, he made the factual finding that
16 that blood was there before the transport. And I -- I
17 think I'm bound by that unless you can show that it is
18 clearly erroneous, which I don't think you can.

19 MR. KISSINGER: Your Honor, first, we -- we
20 believe we have -- have shown that it's clearly
21 erroneous.

22 Second, even viewing the blood evidence
23 separately, even saying, well, Mr. House has put up
24 some evidence of -- some evidence of innocence
25 regarding this blood evidence, but not enough to really

1 sway me regarding that, that evidence itself has to be
2 viewed in light of the entire record. And in light of
3 the entire record, that blood evidence, standing alone
4 in its even somewhat compromised state, no reasonable
5 juror would be able to come to the conclusion that Mr.
6 House was guilty because the remaining evidence of his
7 innocence is also very substantial.

8 JUSTICE O'CONNOR: Are you going to mention
9 any of the other, or are we going to just deal with the
10 blood today?

11 MR. KISSINGER: Justice O'Connor, we -- we
12 would like to move on to -- to some of the other
13 evidence because it -- it is substantial. And we've
14 set -- we've set out a lot of that evidence beginning
15 at page 6 of our reply brief.

16 JUSTICE GINSBURG: Will you also cover,
17 because your time is short, if you get through the
18 gateway on your actual innocence contention, what are
19 your constitutional claims that lie behind it? Because
20 I don't think much was said about in the briefs. What
21 is it that you would -- you would say if you got
22 through the gate?

23 MR. KISSINGER: Justice Ginsburg, as -- as I
24 mentioned earlier, we believe that we have numerous
25 instances of ineffective assistance of counsel. First,

1 counsel's failure to -- upon knowing of the importance
2 of the blood evidence, which he clearly did because he
3 raised -- raised the issue himself, upon knowing of the
4 photograph showing the missing blood, he failed to go
5 forward and basically do what we did in Federal court,
6 which was hire an expert to look at the results of the
7 FBI testing and to determine whether there was a viable
8 defense -- a viable defense strategy available there,
9 which he did not.

10 Also, if we look at the record in this case,
11 we have a situation where trial counsel also pointed
12 toward Hubert Muncey, Jr. as the actual perpetrator of
13 this crime. He actually called the sister of the
14 victim to say that his sister was afraid of Mr. Muncey
15 and that she had plans to leave him. When we look at
16 what was available to trial counsel there, we see five
17 witnesses, many of whom were friends of Mr. Muncey, who
18 presented evidence that showed that on the night of Ms.
19 Muncey's murder, Mr. Muncey and Ms. Muncey had a fight
20 at the C&C Recreation Center, that Ms. Muncey went
21 home, that Mr. Muncey followed her there, that he
22 confessed that when he returned home, he was angry and
23 drunk, that they began to argue again, that he struck
24 her in the head, that she fell, that he checked her
25 lifeless body and found she was dead, and that he hid

1 her body in the bushes.

2 JUSTICE SCALIA: But -- but the -- the
3 injuries on the body are simply not consonant with --
4 with that manner of her -- of her death. A police
5 officer testified not only to a head injury, but to
6 blood coming out of the nose and ears, scratches and
7 bruises on her throat and legs, scratches on her face.
8 That simply is not consonant with one whack on the
9 head.

10 MR. KISSINGER: Justice Scalia, there --
11 there are two issues there. In fact, the -- the
12 pathologist's testimony and -- and the law enforcement
13 officer's testimony is consistent to the extent that
14 the injuries which Mr. Muncey described inflicting
15 were, in fact, inflicted upon the victim. There were
16 those injuries. The point -- the fact that there were
17 additional injuries to the victim -- to the victim
18 assumes that somehow Mr. Muncey's independent, short
19 confession, because, remember, when he started to
20 confess -- after he makes this confession, he's rushed
21 out of the home and told that they don't want to hear
22 anything. This isn't a situation of like a law
23 enforcement -- a confession made to law enforcement
24 where once obtaining evidence of guilt, law enforcement
25 pursues and tries to get as many of the details out of

1 it. I don't believe that it would be -- it's
2 significant or it would be significant to any
3 reasonable juror that Mr. Muncey did not describe every
4 single injury that he inflicted on Ms. Muncey that
5 night.

6 JUSTICE BREYER: You've mentioned -- in
7 response to Justice Ginsburg, you didn't mention -- and
8 perhaps it was inadvertent. If not, I want to know why
9 not. I thought if you get through the gate, what
10 you're going to say is the State should have given us
11 evidence that they had that showed that Mr. Muncey had
12 sexual relations with his wife the morning of the
13 killing, and therefore, the semen that they found
14 didn't necessarily belong to your client, but rather
15 belonged to him. As it turned out, it didn't.

16 MR. KISSINGER: That's correct, Justice
17 Breyer.

18 JUSTICE BREYER: So you're going to make that
19 Brady claim.

20 MR. KISSINGER: We -- we are going to also
21 make the Brady claim. In addition, Your Honor, if
22 indeed that evidence was available to trial counsel,
23 who did talk to Mr. Muncey, who was able to interview
24 Mr. Muncey, and failed to ask Mr. Muncey whether he had
25 had sexual relationships with his wife, even though

1 trial counsel attempted ineffectively at trial to -- to
2 show that -- that that semen belonged to Mr. Muncey.
3 So it's one of those situations, Justice Breyer, where
4 there is either Brady for the State's failure to turn
5 it over, or if it was available, it's another instance
6 of ineffective assistance of counsel.

7 CHIEF JUSTICE ROBERTS: Counsel, could I step
8 -- step back a little bit to get -- to get back to the
9 standard of review? Because I think it's an unusual
10 one. You started out by talking about what the first
11 jury knew and didn't know, but we are in no sense
12 reviewing that jury determination. Correct?

13 MR. KISSINGER: That is correct, Justice
14 Roberts.

15 CHIEF JUSTICE ROBERTS: We are supposed to
16 look at all of the evidence, the new evidence and the
17 old evidence, and determine simply whether or not it
18 would be unreasonable for any juror to vote to convict
19 on the basis of all of that evidence. Is that right?

20 MR. KISSINGER: Your Honor, what Schlup says
21 is that we are to step back and see whether it is more
22 likely than not that no -- that any reasonable juror
23 would vote to convict.

24 JUSTICE BREYER: Any reasonable juror would
25 have to have a reasonable doubt.

1 MR. KISSINGER: Would have -- would have --
2 that's correct, Justice Breyer.

3 CHIEF JUSTICE ROBERTS: So, in other words,
4 no reasonable juror -- no -- no juror could reasonably
5 vote to convict. In other words, if we look at this
6 evidence and think that -- and again, we're not
7 reviewing the prior jury's evidence. If we look at
8 this and say, maybe a jury would come out 10 to 2 in
9 favor of acquittal, if we think that would be
10 reasonable, then you lose. Right?

11 MR. KISSINGER: Chief Justice Roberts, I --

12 CHIEF JUSTICE ROBERTS: Under my hypothetical
13 there are two reasonable jurors who vote to convict.

14 MR. KISSINGER: Chief Justice Roberts, the
15 danger in that hypothetical is that we are approaching
16 an area where the definition of the reasonable juror
17 becomes something subjective. The definition of a
18 reasonable juror is not a subjective inquiry. In fact,
19 it's a -- it's an objective inquiry. So to that
20 extent, I would have to disagree with -- with your
21 analysis or your -- or your hypothetical, which is that
22 maybe there might be two jurors out there who would
23 listen to this evidence and vote to convict Mr. House.
24 I don't think that's a correct statement --

25 JUSTICE SCALIA: Well, Schlup shouldn't --

1 shouldn't have expressed it that way then. Schlup must
2 have -- must have made a big mistake when it said no
3 reasonable juror could. It should have expressed it
4 differently and said a reasonable juror would not --
5 would not have found, but they didn't say that. It
6 said no reasonable juror.

7 MR. KISSINGER: Your Honor, I believe the
8 Court in -- I believe the Court in Schlup took the word
9 reasonable to encompass the point which I have just
10 made.

11 JUSTICE SOUTER: Well, didn't -- you -- you
12 have accepted Justice Scalia's formulation, but my
13 understanding is that Schlup did not say no reasonable
14 juror could. Schlup said no reasonable juror would
15 have. Isn't that correct?

16 MR. KISSINGER: And that's correct, Justice
17 Souter.

18 JUSTICE SOUTER: But I mean, it's would, not
19 could.

20 MR. KISSINGER: It -- it is would.

21 JUSTICE SOUTER: Could would imply a
22 sufficiency of evidence possibility of analyzing it,
23 but the would language excludes a sufficiency of
24 evidence. The -- the would formulation says, in
25 effect, what would the reasonable juror actually have

1 done. Is that your understanding? I mean, is that
2 your point?

3 MR. KISSINGER: That is, Justice Souter.

4 JUSTICE SCALIA: Or more precisely, what
5 would all reasonable jurors have done.

6 MR. KISSINGER: What would any reasonable
7 juror, Justice Scalia.

8 JUSTICE SCALIA: All reasonable jurors.

9 MR. KISSINGER: I believe the language is
10 any.

11 Well, if there are no more questions, I'd
12 like to reserve the remainder of my time.

13 CHIEF JUSTICE ROBERTS: Thank you, Mr.
14 Kissinger.

15 Ms. Smith, we'll hear now from you.

16 ORAL ARGUMENT OF JENNIFER SMITH

17 ON BEHALF OF THE RESPONDENT

18 MS. SMITH: Mr. Chief Justice, and may it
19 please the Court:

20 The evidence presented in the district court
21 fails to raise sufficient doubt about Mr. House's guilt
22 to justify review of his procedurally defaulted claims
23 because reasonable jurors would not ignore the fact
24 that Mr. House's jeans were stained with the blood of
25 Carolyn Muncey. That is a fact that has not been

1 undermined by any of the evidence presented in the
2 Federal habeas proceeding.

3 The enzymatic degradation theory of Dr. Blake
4 was so thoroughly discredited in the Federal
5 evidentiary hearing that it is highly unlikely that any
6 reasonable juror, viewing all the evidence, would be
7 convinced by it, let alone that everyone would vote to
8 acquit in light of it. In fact, the petitioner's
9 evidence of innocence was disputed in nearly every
10 respect and sorely --

11 JUSTICE BREYER: How was -- how was that? I
12 thought you'd go on to say how that -- how was it? I
13 -- I read that Dr. Blake said this. He said, look, I
14 -- there -- there are tiny little specks of blood on
15 the jeans and we test them. They were tested. And
16 they show that a certain enzyme deteriorated to degree
17 X, and that's true of the test tube blood as well.
18 Both deteriorated to degree X. But if you take fresh
19 blood and splatter it, there will be no deterioration.
20 So conclusion: the blood on the jeans came from the
21 test tube. Now, you say that was discredited, but I
22 didn't read anywhere anything that discredited it.
23 What was the discrediting of that?

24 MS. SMITH: That was specifically discredited
25 by the -- by the testimony of Agent Bigbee.

1 JUSTICE BREYER: Who said?

2 MS. SMITH: Dr. Blake's specific opinion was
3 that his interpretation of the enzyme marker study,
4 specifically the GLO1 enzyme on the jeans and on the
5 vial --

6 JUSTICE BREYER: Right.

7 MS. SMITH: -- showed inc -- inc --

8 JUSTICE BREYER: Yes.

9 MS. SMITH: -- which he took to mean
10 incomplete penetrance.

11 JUSTICE BREYER: Yes.

12 MS. SMITH: Agent Bigbee specifically
13 disputed not only the literal interpretation of that,
14 in that it doesn't mean incomplete penetrance. In
15 fact, Agent Bigbee did not know what that even meant in
16 the area of serology, but he -- he disagreed with the
17 meaning that Dr. Blake ascribed to that -- to that
18 definition -- to that notation.

19 JUSTICE BREYER: Which meant what?

20 MS. SMITH: Which Dr. Blake concluded that --

21 JUSTICE BREYER: Was incomplete, and what did
22 the FBI man say it was?

23 MS. SMITH: Agent Bigbee testified -- or Dr.
24 Blake testified that the inc meant that the enzyme was
25 not present, that it had dropped out.

1 JUSTICE BREYER: He -- he says it meant
2 incomplete. And what do you -- what did -- what did
3 Dr. Bigbee say it --

4 MS. SMITH: Dr. Blake said it was not
5 present. It had dropped out. Agent --

6 JUSTICE BREYER: Now -- I -- Dr. Blake, you
7 just said, said that the word inc meant incomplete.

8 MS. SMITH: That's correct.

9 JUSTICE BREYER: And you say Dr. Bigbee
10 discredited that by saying, no, it didn't mean that.

11 JUSTICE SCALIA: It's Agent Bigbee. I'm
12 getting confused.

13 JUSTICE BREYER: It meant something else.
14 What is the something else?

15 MS. SMITH: Agent Bigbee testified that inc
16 means --

17 JUSTICE BREYER: Means.

18 MS. SMITH: -- inclusive --

19 JUSTICE BREYER: Fine. Now, all right --

20 MS. SMITH: -- which means that the enzyme is
21 present --

22 JUSTICE BREYER: Fine, okay.

23 MS. SMITH: -- but that he could not subtype
24 it.

25 JUSTICE BREYER: They don't know how much.

1 Now, I have on page 119, which they cite, of
2 the transcript Mr. Pruden is talking to Mr. -- Dr.
3 Blake. Would your opinion change, doctor, if the,
4 quote, inc notation meant inconclusive rather than
5 incomplete penetration? Answer: same difference.
6 Question: so your opinion would not change? Answer:
7 that is correct.

8 MS. SMITH: But the -- the dispute goes
9 beyond the literal interpretation of the inc. It goes
10 to the meaning ascribed to it. And Agent Bigbee
11 disagreed that Dr. Blake -- with Dr. Blake's conclusion
12 that the inc indicated that the enzyme had dropped out
13 of the sample. He said it was present. It could not
14 be typed.

15 Agent Bigbee also disagreed with Dr. Blake's
16 overarching theory that there was equal deterioration
17 in the vials -- in the blood in the vials and the
18 blood on the pants. In fact, Agent Bigbee went through
19 step by step --

20 JUSTICE BREYER: But it would have been the
21 easiest thing in the world for you if, in fact, you
22 think that this is not true that enzyme GL706BX,
23 contrary to what Dr. Blake said, had not deteriorated
24 in the blood spot, do a test. Find out if it's
25 deteriorated or not. Can't -- can't that be done?

1 I mean, Dr. Blake in this part is reading his
2 own report. His own report says the enzyme
3 deteriorated in the spots on the jeans, and I see
4 nothing here that says to the contrary. But if that
5 weren't true, the blood is right there, and if it
6 weren't true that it had deteriorated, I would have
7 expected testimony, at the least, saying no, Dr. Blake,
8 you are wrong.

9 MS. SMITH: Your Honor, that --

10 JUSTICE BREYER: The blood did not
11 deteriorate. The enzyme did not deteriorate. But
12 there is no such testimony. Instead, you seem to be
13 relying on the difference between the word incomplete
14 and inclusive, a difference that Dr. Blake says is
15 inclusive or incomplete.

16 MS. SMITH: Dr. Blake was not reading his own
17 report. Dr. Blake performed no independent analysis.
18 Dr. Blake was reading Agent Bigbee's report. Agent
19 Bigbee was explaining to the district court the meaning
20 of the notations that he included in his report.

21 But the -- but the dispute goes beyond just
22 experts.

23 CHIEF JUSTICE ROBERTS: So Bigbee -- Bigbee
24 was explaining what he meant when he wrote inc.

25 MS. SMITH: That's correct, Your Honor.

1 CHIEF JUSTICE ROBERTS: And it was different
2 than what Dr. Blake said it meant.

3 MS. SMITH: That's correct, Your Honor. The
4 report at issue was a report prepared pretrial by Agent
5 Bigbee when he did the -- the initial enzyme analysis.

6 JUSTICE SCALIA: The district court heard all
7 of this, didn't it, all this evidence, and -- and
8 didn't the district court make a factual finding?

9 MS. SMITH: That's correct, Your Honor. Not
10 only did the district court note --

11 JUSTICE SCALIA: I mean, we -- we can call in
12 these witnesses ourselves, I suppose, and hear them all
13 again, but we usually accept the factual findings of
14 the trier of fact.

15 MS. SMITH: That's correct, Your Honor. And
16 the district court specifically found as a fact that
17 the blood spill --

18 JUSTICE STEVENS: But does that finding rest
19 on the conclusion that Dr. Blake was not credible and
20 Agent Bigbee was credible?

21 MS. SMITH: I think that that conclusion
22 implicitly includes a finding that Agent Bigbee was --
23 was credible and Dr. Blake was not credible.

24 JUSTICE STEVENS: And that Dr. Blake was not
25 credible.

1 MS. SMITH: There were additional --

2 JUSTICE STEVENS: And who -- what was Dr.
3 Blake's background?

4 MS. SMITH: Dr. Blake's background is -- is
5 that he was a forensic pathologist.

6 JUSTICE STEVENS: Employed often by the
7 State?

8 MS. SMITH: He was often employed by the
9 State. He had a history of -- of being employed by the
10 State. At this time, he was not a State agent, Your
11 Honor. He was not -- had not worked in any way, shape,
12 or form on this case. He did not perform the autopsy.
13 He did not view the body. He did not perform the
14 enzyme marker study in this case. He simply came in
15 and reviewed results and photographs that had been
16 conducted and taken by -- by individuals previously.
17 He had no direct responsibility in this case aside from
18 --

19 JUSTICE STEVENS: So you're -- you're
20 basically arguing he was not a credible witness.

21 MS. SMITH: He was not a credible witness,
22 Your Honor.

23 JUSTICE BREYER: What -- what is the answer
24 to my question? Because I do think it turns on this.
25 A lot does. The trial judge sat there and said this is

1 very important. Dr. Blake is quoting from something
2 called part 5, which I thought was his report. And
3 then the trial judge says, where did you get that idea?
4 Where did you get that idea, that the -- that the
5 enzyme wasn't there in -- in the jeans' blood? Where
6 did you get it? And he says I got it from the FBI
7 report, I think. He's not certain because he's
8 remembering his own conclusion. He isn't quite sure
9 where he got it from.

10 And now it turns out that the inc when they
11 -- it said inc, which he thought meant there isn't much
12 enzyme there. And then they say, well, maybe it meant
13 inclusive. And he says, that wouldn't matter because I
14 guess I took it to mean that too would show there
15 wasn't much enzyme there. Both would come to the same
16 thing.

17 And now, if I'm sitting there and thinking,
18 I'm thinking, well, either there is or there isn't this
19 enzyme in the -- in the blood that's right there.
20 Easiest thing in the world to prove. And if somebody
21 is going to dispute it, the State will come back and
22 say, no, no, the enzyme is there. But they didn't.

23 So I read the testimony and I read the fact
24 that you didn't dispute it with any evidence that's
25 saying, yes, the enzyme is not there.

1 MS. SMITH: Your Honor, Agent Bigbee
2 specifically testified that the enzyme was there.

3 JUSTICE BREYER: He did? Where is that?

4 MS. SMITH: He specifically testified on page
5 282 of the joint appendix. He specifically said, that
6 doesn't mean it wasn't present. He also pointed out
7 GLO should have been present --

8 JUSTICE BREYER: Let's --

9 MS. SMITH: -- and said it wasn't.

10 JUSTICE BREYER: It doesn't mean it isn't
11 present isn't quite the same thing, is it?

12 MS. SMITH: Agent Bigbee specifically
13 testified that the enzyme was present. It could not be
14 typed to any degree of certainty. So he simply called
15 it inconclusive but that it was present. If it had not
16 been present, he would have marked N/A, meaning no
17 activity, which was also included in the report in a
18 separate location.

19 But I think it goes beyond --

20 JUSTICE GINSBURG: Ms. Smith, would -- could
21 you focusing on this, what's called a finding, although
22 the district judge himself puts it under conclusions of
23 law, just -- the court concludes that the spillage
24 occurred after the FBI crime laboratory received and
25 tested the evidence. What is the basis, the specific

1 basis, for that conclusion, that it occurred after the
2 FBI tested the evidence?

3 MS. SMITH: The specific basis identified
4 explicitly in the opinion was that Special Agent Scott,
5 when he removed the -- the blue jeans from the hamper
6 in Donna Turner's trailer, saw what appeared to be
7 bloodstains on the jeans. That blood ultimately ended
8 up testing as -- as positive for blood and, in fact,
9 Carolyn Muncey's blood so that -- so that the stains
10 were observed when they were removed from the hamper.
11 He also noted that Agent Bigbee testified when he
12 received the blood at the -- the FBI laboratory, there
13 was no evidence of contamination.

14 Agent Bigbee testified to the FBI protocols
15 and said that if there had been any evidence of
16 contamination or spillage, the evidence would have been
17 returned without testing. So he looked specifically at
18 that.

19 He also looked and specifically pointed out a
20 significant -- the testimony of Paulette Sutton, who
21 indicated -- who was the blood spatter expert. She
22 indicated that some of the bloodstains were mixed with
23 mud, and to her that indicated that there had not been
24 some accidental spillage in -- in an evidence
25 container, that the mud and the blood would have --

1 were -- were combined to the extent that they would
2 have to get on the jeans at or near the same time. So
3 those -- those things --

4 JUSTICE GINSBURG: Yes, but then there was
5 also the evidence that was not disputed, that it was a
6 dry day and that there was no mud at all at the scene
7 of the crime.

8 MS. SMITH: Your Honor, I'm not sure that the
9 evidence is undisputed that it was a dry day. If you
10 look at the autopsy report that's in -- that's in
11 evidence in -- in the trial record, it specifically
12 says that it was drizzling that day, that the
13 temperature was between 80 and 90 degrees and it was
14 drizzling. Mr. House showed up with blood all over his
15 jeans. He got the blood somewhere. I don't -- nothing
16 is -- I don't think it's entirely clear that -- that
17 the conditions were dry. His -- his jeans were clearly
18 muddy --

19 JUSTICE GINSBURG: I thought that was --

20 MS. SMITH: -- and it showed up.

21 JUSTICE GINSBURG: -- that it was agreed that
22 there -- that the site where the body was found, that
23 that was dry, that that was dry ground. I thought
24 there was no dispute about that.

25 MS. SMITH: I'm not sure that -- that it's

1 clear where Mr. House got the mud on his jeans. He was
2 -- he traveled some distance from the site of the body
3 and -- and to his home. He could have gotten muddy en
4 route. I -- I can't explain how he got the blood on
5 his jeans. I know he showed up with muddy jeans. He
6 got mud on his jeans at some point, and those -- and
7 the mud and the blood were -- were intermingled. I'm
8 not sure that they got on there at the same time.

9 I'm also not sure that the mud that Paulette
10 Sutton saw was -- was created by a combination of mud
11 and water. It could have been perspiration. It could
12 have been any other type of -- of fluid. It could have
13 been blood creating the mud.

14 So it's -- that is -- that's very ambiguous,
15 and -- and I think that the fact -- the significance of
16 the testimony is that it -- it did not indicate an
17 accidental spillage after the fact of the blood onto
18 the jeans. And I think that was -- that was the point
19 that the district court took from that. He wasn't
20 trying to -- to recreate the exact sequence of events
21 in the crime. He was simply trying to pinpoint at what
22 point the blood spilled because there's no question the
23 blood spilled. The -- the photograph shows it spilled.

24 The photograph shows that the -- that the tops had
25 come off. But the -- the photograph also shows --

1 JUSTICE KENNEDY: But -- but isn't there also
2 evidence that the spillage in the styrofoam container
3 seemed to be inadequate to account for all of the blood
4 that was missing from the vial?

5 MS. SMITH: I think there was testimony that
6 -- that the appearance of it seemed to be inadequate.
7 There was no specific quantification of the blood, and
8 -- and no one -- no one attempted to do that. It's not
9 clear whether some of the blood leaked out of the
10 container and maybe wasn't contained within it. There
11 were -- there were pieces of gauze that had blood
12 soaked in it. There was also a dispute about the size
13 of the vials.

14 JUSTICE KENNEDY: Well, but that's important
15 for this whole question. Quantity relates to chain of
16 custody.

17 MS. SMITH: Your Honor, I think what's
18 important is the point of the spillage. If -- if the
19 blood spilled after it left the FBI lab -- and that was
20 a specific finding made by the district court, and that
21 finding is clearly supported by the record. What
22 happened to the blood, where it spilled after the fact
23 -- and we know that it did spill -- really is -- is
24 beside the point because --

25 JUSTICE BREYER: Another blood question

1 because I -- the -- you make a point of the -- the
2 sheriff having said, well, I -- I saw blood on the
3 jeans. So I looked at the pictures and the pictures
4 seem to have little tiny bits of blood, while a lot of
5 mud. So I came to the conclusion that no reasonable
6 person could think that that testimony really shows
7 that the -- that there was -- there was blood from the
8 -- from the victim on his jeans.

9 Now, am I right about that? You're going to
10 think I'm wrong, and I want to hear why.

11 MS. SMITH: Well, I do think you're wrong,
12 Your Honor, because I -- I think that if you look in
13 the record, there are at least four witnesses who
14 indicated that they saw the blood. One was Special
15 Agent Scott.

16 JUSTICE BREYER: How could you have? It's so
17 tiny.

18 MS. SMITH: Well, Your Honor, the -- the
19 photographs that you have are photographs that are
20 taken after portions of the jeans have been cut out and
21 sent for testing. You're not seeing everything that --
22 that the agent saw. Special Agent Scott saw what he
23 believed to be blood. He couldn't -- he didn't know it
24 was blood, but -- but he suspected it was blood. He
25 identified in -- in the habeas proceeding the areas

1 that he believed it to be blood, and it turned out to
2 be blood.

3 Jerry Morissey, who was the defense
4 serologist and -- and, incidentally, just to -- that
5 reminds me of -- of a comment made by my colleague in
6 his argument about defense counsel's deficiency in not
7 -- in not hiring a serologic expert. He had a
8 serologic expert. Jerry Morissey testified, was a
9 serologist, and testified that he received the jeans
10 after the FBI tested it. He was unable to duplicate
11 the result, but as part of his testimony, he said that
12 he observed some bloodstains, what he thought to be
13 bloodstains, around the FBI cuttings, and he attempted
14 to do additional testing on those bloodstains. So he
15 saw the stains.

16 Agent Bigbee testified that he observed the
17 stains. He didn't say that some were big or some were
18 small. He said that he observed them.

19 As well, Paulette Sutton in the Federal
20 habeas proceeding said that she saw the stains. She
21 said she couldn't tell upon observation that it was
22 blood, but it was dark and she suspected it was blood.
23 It was suspicious.

24 So we have at least four witnesses who say
25 they saw this blood. This wasn't microscopic. This

1 was something that -- that witnesses -- and
2 incidentally, Paulette Sutton's observation was borne
3 out because she did presumptive testing. So the things
4 that -- the spots that she suspected were blood in fact
5 turned out to be blood.

6 JUSTICE SCALIA: Ms. Smith, could -- could
7 you go on to some of the other elements that are
8 contested here? In particular, I'm interested in -- in
9 Mr. Muncey's confession. What -- what do you -- what
10 do you say about that?

11 MS. SMITH: Your Honor, I -- I think of all
12 the evidence presented below, I think that the
13 confession evidence is -- is perhaps the least reliable
14 in terms of -- of the Schlup analysis.

15 JUSTICE O'CONNOR: What did the jury hear
16 about Muncey's confession?

17 MS. SMITH: The jury was never informed of
18 Muncey's confession because the --

19 JUSTICE O'CONNOR: I thought not.

20 MS. SMITH: -- the fact of Muncey's
21 confession didn't come up until 13-14 years after the
22 trial had already been concluded. And -- and that's
23 one of the things that the district court, in -- in
24 examining their testimony, found what was significant
25 in his --

1 JUSTICE SOUTER: But wasn't the district
2 court incorrect in that? Because as I understand it,
3 there was evidence from one of the two witnesses who
4 put in the confession evidence that she had gone to the
5 sheriff's department to -- to tell them about the
6 confession and had simply gotten a runaround and
7 finally left. So as I understand it, the -- the record
8 would not support the finding that -- that the -- the
9 sources of evidence simply kept silent for over a
10 decade.

11 MS. SMITH: Well, that's what the witness
12 testified to, Your Honor.

13 JUSTICE SOUTER: Well, is there any reason
14 not -- did the -- did the district court explain that
15 it was rejecting that element of the witnesses'
16 testimonies?

17 MS. SMITH: The district court did not
18 specifically address that element of the witnesses'
19 testimony. The court found that it -- specifically
20 that it was not impressed with the testimony of a
21 witness who waits. And -- and this Court has said on
22 many occasions that --

23 JUSTICE SOUTER: I know, but without getting
24 to that point, it sounds as though the district court
25 simply made a mistake, just forgot I suppose, the

1 evidence that the witness didn't wait at all.

2 MS. SMITH: Your Honor, regardless of whether
3 the witness waited or not, the Court examined the
4 credibility of the testimony and found that it wasn't
5 credible.

6 JUSTICE SOUTER: Well, but one of the reasons
7 for the finding of -- of incredibility was the decade
8 or more of silence.

9 MS. SMITH: That was one of the reasons, but
10 the primary reason that the -- that the confession
11 itself was inconsistent with the other evidence, and
12 that was what the court specifically pointed to in his
13 opinion.

14 JUSTICE SOUTER: Well, the -- tell -- help me
15 out here. As -- as has been explored earlier, the
16 confession referred to -- to some of the injuries on
17 the body, but not to all of them. Were there -- were
18 there other disparities between the confession and --
19 and the -- and other evidence?

20 MS. SMITH: There were several disparities,
21 Your Honor. The confession indicates that there was
22 apparently an extensive argument at home. The
23 testimony of the daughter both at trial and in the
24 habeas corpus proceeding was that there was no such
25 argument. She heard no argument. And the court,

1 incidentally, found her testimony to be very credible.

2 He observed her demeanor and -- and found her
3 testimony to be credible. So that's inconsistent.

4 JUSTICE GINSBURG: Well, as far as that's
5 concerned, she did testify that there was a car out
6 there.

7 MS. SMITH: That's correct.

8 JUSTICE GINSBURG: And the rest of the story
9 doesn't -- doesn't put the defendant House at the time
10 of the crime in a car. He's walking.

11 MS. SMITH: Your Honor, the -- the testimony
12 at trial was ambiguous about the -- about the car. The
13 witness identified two separate incidents. She heard a
14 car and she heard someone inquire as to Mr. Muncey's
15 whereabouts, and then she also heard an individual come
16 and tell her -- her mother that her father had been in
17 a wreck down by the creek and heard her mother leave
18 sobbing. Those are two distinct incidents. And Lora
19 Muncey testified that she did not know whether she had
20 gone back to sleep. She never could identify or -- or
21 define the specific length of time between the two.

22 But logically those are two separate
23 incidents. It doesn't make sense for someone to come
24 and ask where Mr. Muncey is and then to say, well, he's
25 down by the creek. He just had a wreck. So it -- it

1 seems that just logically those are two separate
2 incidents, and there's nothing in the -- in the
3 testimony to indicate that -- that they're same.

4 JUSTICE GINSBURG: But they happened at the
5 same time, didn't they? The --

6 MS. SMITH: No, Your Honor. The --

7 JUSTICE GINSBURG: -- the child testified to
8 what she heard, and I thought she heard a car and
9 someone in a low voice, and then her mother left with
10 that someone.

11 MS. SMITH: No, Your Honor. She heard a car
12 and someone inquire as to the whereabouts of her
13 father, and she heard her mother answer. And then
14 there was a period of time where she said she wasn't
15 sure whether she went back to sleep or not, and then
16 she heard a person with a low voice come in and inform
17 her mother that she -- that -- that her father, Hubert
18 Muncey, Jr., had been in a wreck down by the creek.
19 She heard her mother sob and leave with the individual
20 who had relayed that information. Those are two
21 distinct incidents.

22 But beyond that -- the -- the court,
23 incidentally, found her testimony to be very credible,
24 found that her testimony did not support this -- this
25 theory of some sort of confrontation in the house.

1 In addition, the court also heard the live
2 testimony of Hubert Muncey, Jr. himself, explaining his
3 whereabouts, explaining -- and actually denying ever
4 having made the statement. And -- and the court
5 balanced that.

6 As well, Dennis Wallace, who testified at the
7 evidentiary hearing -- he investigated a missing
8 person's report. He was in the home. He saw no
9 evidence of any sort of struggle in the home.

10 So all of these things balanced against this
11 -- this confession, which has absolutely no
12 corroborative support in the record, the court found
13 that the testimony simply wasn't credible.

14 JUSTICE STEVENS: Well, it did have
15 corroboration. Wasn't there a -- a wound on the victim
16 that was consistent with -- with the confession?

17 MS. SMITH: There was a -- a wound to the
18 victim's left forehead.

19 JUSTICE STEVENS: Was that not consistent
20 with the confession?

21 MS. SMITH: The confession was that Mr.
22 Muncey hit her and she fell and hit her head.

23 JUSTICE STEVENS: You tell me yes or no. Was
24 it -- was it consistent with the confession?

25 MS. SMITH: It -- it could be consistent with

1 the confession. It was -- it was very sketchy. There
2 -- there was a dispute between the two pathologists in
3 the habeas as to whether or not that -- that wound
4 could have been sustained by -- by falling and hitting
5 her head on the table and actually could have created
6 the -- the damage in -- in the brain.

7 JUSTICE BREYER: So overall, if -- looking at
8 this -- and that's why I think the question about the
9 weight to give to the fact finding is important. You
10 think -- you have a theory under which he could have
11 done it, and it's certainly possible in my opinion.

12 But also you think, my goodness, if he did
13 it, going and this luring of the woman to the creek --
14 you know, there's nothing else in the record that
15 suggests he would plot in that way to do this.
16 Nothing. The husband is away at the time from the
17 dance. He could have done it. They are fighting.
18 They could have done it. And if the luring theory
19 correct, the motive was sexual, but the sexual physical
20 evidence is from the husband, not from him.

21 So the jury is brought into this on a theory
22 that there is a sexual attack and the one -- by the
23 defendant, and the one thing that seems disproved
24 pretty much is that. And now we have two experts, Dr.
25 Blake and Dr. Bigbee. And reading a page, which I

1 hadn't read thoroughly until you pointed it out, I'd
2 say they might disagree. They might disagree. And
3 it's just not conclusive.

4 So if you're sitting there, do you have to
5 have a reasonable doubt when there's such strong
6 evidence for both people? And -- and the part that's
7 bothering me -- I -- I see what that district judge
8 said on that one point, which he may have thought was
9 peripheral but it turns out to be quite important about
10 when the blood spilled. But if you look to the
11 underlying thing and I think, well, maybe you're right,
12 but maybe you're not right.

13 And so how do -- how do I -- how do I do
14 this? What's the -- what's the weighing? I sit there
15 and think, my goodness, I don't know who committed this
16 crime if I'd been on that jury. And could -- could a
17 person sitting there reasonably come to a conclusion,
18 my goodness, I know?

19 MS. SMITH: Well, Your Honor, to answer your
20 question is if you are at that mental state where you
21 are saying maybe this evidence is right, maybe that --
22 that evidence is right, maybe I can go one way or
23 another, then I think the respondent prevails in this
24 case --

25 JUSTICE SOUTER: Well, but that -- that says

1 if the -- it seems to me you're simply saying there
2 would be sufficient evidence to go the one way rather
3 than the other. And -- and you may well be right about
4 that, but that certainly is not the reasonable doubt
5 standard.

6 MS. SMITH: I think it goes beyond just
7 having sufficient evidence to convict, Your Honor. I
8 think you also look at these credibility determinations
9 and you look at the probabilistic result of a
10 reasonable juror.

11 JUSTICE SCALIA: Justice Breyer has not heard
12 these witnesses and hasn't had the opportunity to know
13 whether -- whether, for example, these -- this
14 testimony about the confession was credible or not.

15 MS. SMITH: That's correct, Your Honor.

16 JUSTICE SCALIA: And the hearer of -- at the
17 trial did have that opportunity.

18 MS. SMITH: The district court heard both of
19 the -- both of the sisters regarding the confession.
20 The district court heard Hubert Muncey, Jr. regarding
21 the alleged confession.

22 JUSTICE SOUTER: But -- but may I interrupt
23 you? What -- what about -- I want to just follow up on
24 something that Justice Breyer alluded to and that is
25 the significance of the DNA evidence. And I have

1 tended to -- to think that a reasonable juror would
2 look at it this way, but if I'm wrong, I -- I want you
3 to comment on it.

4 One of the -- I -- I assume, to begin with,
5 that any reasonable juror would have found this
6 evidence, the evidence of the semen stains, extremely
7 significant because not only did the State argue rape
8 as a -- as a motive, possible motive, but there was a
9 specific finding of an aggravated circumstance that the
10 murder occurred in the course of kidnapping and rape.
11 I don't know of any evidence that would suggest an --
12 an independent kidnapping crime without the rape
13 element under, you know, the circumstances of -- of
14 this crime. So I'm -- I -- I assume that the
15 reasonable juror, having come to the conclusion that
16 that aggravating circumstance is true, found that a
17 rape was being committed.

18 If that juror had heard the DNA evidence,
19 that juror would have said the only positive evidence
20 that a rape was committed here would be evidence that
21 pointed to the husband, not in fact to -- to the
22 defendant House. And if -- if a juror had heard that
23 evidence, it seems to me it is highly unlikely that any
24 reasonable juror would have concluded that that
25 aggravating circumstance was found, and I suppose that

1 would play a -- a significant role in -- in the
2 ultimate conclusion.

3 Now, you have argued that the fact that the
4 DNA evidence shows that it was the husband's fluids,
5 not House's, doesn't conclusively prove that House
6 didn't rape her, and of course, you're right. But my
7 understanding is that there is no evidence from which
8 one would reasonably infer that House did this.

9 Now, what is -- what is your comment on that
10 --

11 MS. SMITH: My comment -- sorry.

12 JUSTICE SOUTER: -- analysis?

13 MS. SMITH: My comment on the DNA evidence is
14 that the DNA evidence did nothing more than confirm
15 what the jury was -- already knew was very likely,
16 which was that the donor of the semen was the husband.
17 The jury at trial was informed that the husband -- and
18 it went through several pages. In the joint appendix,
19 it goes all the way from page 56 to 66 where we're
20 exploring that the semen could have been deposited by
21 the husband or by Mr. House.

22 JUSTICE KENNEDY: But there was a finding
23 that it was in the course of the rape.

24 MS. SMITH: There was --

25 JUSTICE KENNEDY: That was part of that.

1 That was -- that was one of the -- was it one of three
2 aggravating circumstances?

3 MS. SMITH: One of three, and -- and that was
4 --

5 JUSTICE KENNEDY: It was found at the guilt
6 phase or the trial phase, the aggravating circumstance?

7 MS. SMITH: It was at -- it was an
8 aggravating circumstance of sentencing, that -- that
9 the murder was perpetrated in the -- in the attempt --
10 in -- in the perpetration or attempt to perpetrate
11 kidnapping or rape or attempted rape.

12 JUSTICE KENNEDY: Well, then at -- at a
13 minimum, it seems to me that the sentencing phase is --
14 is in question by that.

15 But also, it seems to me if I were a juror
16 and was faced with these conflicting things, I always
17 look for motive.

18 MS. SMITH: Your Honor, the motive is -- is
19 well supported by the circumstances. And in fact, if
20 you look at the prosecutor's argument --

21 JUSTICE SCALIA: There is evidence of rape
22 besides -- besides the semen. The semen wasn't the
23 only evidence of rape, was it?

24 MS. SMITH: No, sir, it wasn't.

25 JUSTICE SCALIA: There were scratches on the

1 thighs.

2 MS. SMITH: There was --

3 JUSTICE KENNEDY: But -- but the semen was
4 used to -- to connect it to the -- to the defendant,
5 and we now know that that's wrong.

6 MS. SMITH: The prosecutor argued at trial on
7 the motive question, why else would someone lure a
8 woman out of her home with a lie in the middle of the
9 night in her night clothes and take her out into the
10 woods, if not to have some sort of --

11 JUSTICE STEVENS: Who put in the evidence --
12 who put in the semen evidence?

13 MS. SMITH: The State put in the semen
14 evidence, Your Honor.

15 JUSTICE STEVENS: It didn't have to prove
16 that she had sex with her husband? Is that the reason?

17 (Laughter.)

18 MS. SMITH: The State put in the semen
19 evidence because it was -- it was not inconsistent with
20 Mr. House and that there was other evidence in the
21 record that was not -- all of the -- all this -- this
22 physical evidence was consistent with Mr. House, just
23 as the semen was.

24 JUSTICE GINSBURG: Isn't it --

25 CHIEF JUSTICE ROBERTS: Can I get back to

1 this -- the standard of review question? Because it
2 goes directly to this point. Even if you think that
3 the argument based on the semen is not harmless error,
4 in other words, that the prior jury may well have
5 convicted based on that, we're not reviewing that
6 jury's determination. Correct?

7 MS. SMITH: That's correct, Your Honor.
8 You're looking at how -- how a reasonable juror would
9 view the case if it knew --

10 CHIEF JUSTICE ROBERTS: So we should be
11 looking at the case with the semen evidence showing
12 what we know it to show, regardless of whether we think
13 the prior jury was misled by the admission of that
14 evidence.

15 MS. SMITH: That's absolutely correct, Your
16 Honor. If -- if the -- if a reasonable jury knew that
17 the semen belonged to Mr. -- belonged to Mr. Muncey and
18 not Mr. House, the result would be exactly the same
19 because Carolyn Muncey's blood was all over Mr. House's
20 pants. That is an indisputable fact. And all of this
21 --

22 JUSTICE GINSBURG: What about at the
23 sentencing stage? Justice Kennedy brought it up. The
24 -- the prosecutor didn't emphasize unduly the semen at
25 the -- at the guilt stage but, boy, made a big deal out

1 of it at the sentencing stage.

2 MS. SMITH: Your Honor, I disagree that --
3 that they made a big deal. They made a big deal of
4 the kidnapping at the sentencing phase. That was --
5 that was of significance. The -- what the prosecutor
6 did --

7 JUSTICE GINSBURG: Where was it in the -- in
8 the joint appendix? I thought it was more than
9 kidnapping.

10 MS. SMITH: Your Honor, the -- the sentencing
11 phase argument is not contained in -- in the joint
12 appendix. The closing argument from the guilt phase is
13 contained in -- in the joint appendix, but it's
14 certainly in the -- in the transcripts before the
15 Court.

16 What -- what the prosecutor focused on at
17 sentencing was -- was the kidnapping and also was the
18 malice and -- and I'm sorry -- the -- specifically the
19 kidnapping --

20 JUSTICE GINSBURG: Said nothing about the
21 semen --

22 MS. SMITH: The --

23 JUSTICE GINSBURG: -- at the -- at the
24 sentencing stage?

25 MS. SMITH: At the sentencing phase, the

1 prosecutor said that the evidence would have been
2 consistent with sexual molestation, I think was the
3 word that he used.

4 CHIEF JUSTICE ROBERTS: Thank you, Ms. Smith.

5 MS. SMITH: Thank you, Your Honor.

6 CHIEF JUSTICE ROBERTS: Mr. Kissinger, you
7 have 4 minutes remaining.

8 REBUTTAL ARGUMENT OF STEPHEN M. KISSINGER
9 ON BEHALF OF THE PETITIONER

10 MR. KISSINGER: Very quickly. Dr. Blake's
11 testimony was not, in fact, discredited. Counsel for
12 respondent says that -- places great significance on --
13 on Dr. Blake's interpretation of the initials inc as
14 standing for incomplete penetration, and that --
15 correctly that should have been construed as
16 inconclusive. Counsel fails to acknowledge the record
17 -- record 4 of the district court, volume 6, page 906.
18 Agent Bigbee himself uses the term inc to mean -- or
19 incomplete, just as Dr. Blake did. So in addition to
20 Dr. Blake saying, yes, I meant the same thing as
21 Justice Breyer observed, Justice Bigbee himself uses
22 the term inc to mean incomplete.

23 CHIEF JUSTICE ROBERTS: Page 282 of the joint
24 appendix, he says inconclusive is what the inc stands
25 for. Dr. Blake testified it is incomplete penetration,

1 which I haven't the foggiest idea what that means.

2 MR. KISSINGER: And that's correct, Your
3 Honor. In trial, he used -- he said that inc stands
4 for incomplete, and then Agent Bigbee at trial
5 proceeded to use incomplete and inconclusive
6 interchangeably just as Dr. Blake did.

7 In addition, when -- concerning Dr. Blake's
8 testimony, we have to remember that we still have the
9 missing tube of blood, and the blood on the jeans is
10 more consistent with blood coming from the degraded
11 blood sample than it is from blood which came -- got on
12 the jeans during the time of the offense.

13 The other thing, which I think is an
14 important matter to -- to keep in -- keep in mind
15 regarding Dr. Blake's testimony and Dr. Bigbee's, is
16 that Dr. Blake and Agent Bigbee both agree on the basic
17 science that blood enzymes deteriorate according the
18 various environmental factors and that as they
19 deteriorate, they become less detectable.

20 In terms of the -- the implicit credibility
21 findings, which respondent relies upon, the district
22 court during its opinion demonstrated that it know --
23 it knew how to make credibility findings. In fact, it
24 made two specific credibility findings in this case
25 when it found Mr. House's testimony to be incredible

1 and the testimony of Lora Muncey to be credible.

2 As far as the -- the suggestion that, yes,
3 there was -- the crime scene was wet, that that -- that
4 there was water at -- or there's a possibility of mud
5 at the crime scene, not only is this contradicted by
6 the absence of the mud -- of mud on the victim's
7 clothing, but also the drizzling which counsel
8 described occurred on the day following the murder, not
9 before it happened, not at the time the murder was
10 occurring, but on the day following the murder. So, in
11 fact, there was -- the murder scene was dry, just as
12 petitioner has informed the Court.

13 As far as the daughter not hearing any sign
14 of a struggle, the daughter's testimony was that she
15 did not hear any sign of a struggle when she got up
16 immediately after her mother left the home. The
17 testimony at the evidentiary hearing, unrebutted and
18 unimpeached, was that at that point in time when she
19 was hearing nothing, her mother was, in fact, at the
20 C&C Recreation Center involved in a fight with Hubert
21 Muncey, Jr. In fact, that testimony goes to Mr.
22 House's innocence because at the time she hears
23 nothing, she hears no sign of a struggle, is the very
24 time that the State of Tennessee contended that Mr.
25 House was out murdering Carolyn Muncey, and yet the

1 daughter who was outside of the home within 50 yards of
2 where this murder occurred heard absolutely nothing.

3 Justice Scalia asked was there, in fact,
4 other evidence of -- of rape. Wasn't there, in fact,
5 bruises found on her thighs? On cross examination, the
6 pathologist testified, admitted on cross examination,
7 that the scratches on Ms. Muncey's thighs were more
8 likely attributable to her being dragged through the
9 brush and her body being hidden which, incidentally, is
10 an act which Mr. Muncey confessed to doing.

11 In addition, as I stated before, the evidence
12 has to be viewed in light of the entirety of the
13 evidence of the record. It isn't just the blood
14 evidence. It isn't just the semen evidence. It isn't
15 even just the confession. It's also the fact that the
16 same witness who puts Mr. Muncey -- or who Mr. House
17 even leaving the Donna Turner home on the night of the
18 murder puts Mr. House leaving the home at a -- thank
19 you, Your Honor.

20 CHIEF JUSTICE ROBERTS: Thank you, counsel.

21 The case is submitted.

22 (Whereupon, at 12:08 p.m., the case in the
23 above-entitled matter was submitted.)

24

25